No. 79-1236

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FRANK L. CARSON, LAWRENCE HATCHER, and STUART E. MINES,
Petitioners,

v.

AMERICAN BRANDS, INC., T/A THE AMERICAN TOBACCO COMPANY; LOCAL 182, TOBACCO WORKERS INTERNATIONAL UNION,
Respondents.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	iii
ARGUMENT.....	1
I. THE DISTRICT COURT'S ORDER REFUSING ENTRY OF THE PROPOSED CONSENT DECREE GRANTING PETITIONERS AN INJUNCTION IS APPEALABLE UNDER 28 U.S.C.§ 1291(a)(1) AS AN INTERLOCUTORY ORDER REFUSING AN INJUNCTION	1
A. The District Court's Order Determined the Merits of this Action	3
1. The District Court Would Not Have Considered De Novo The Grounds for a Preliminary Injunction	3
2. The District Court Would Not Have Reconsidered its Order	11
3. The District Court Passed on the Sufficiency of Petitioners' Claim for Preliminary and Permanent Injunctive Relief	15
B. The District Court's Order Could Not Be Reviewed Prior to Final Judgment	19

Page

C. The District Court's Order Will Cause Petitioners Irreparable Injury Unless An Immediate Appeal is Allowed 25

II. THE DISTRICT COURT'S ORDER IS A COLLATERAL ORDER WHICH IS APPEALABLE AS AN EXCEPTION TO 28 U.S.C.§ 1291 .. 31

A. The District Court's Order Conclusively Determined Important Interests of The Parties Concerning Settlement and the Use of a Remedial, Race-Conscious Affirmative Action Plan 31

B. The Order of the District Court Resolved Important Issues Completely Separate From the Merits of the Action 39

CONCLUSION..... 44

TABLE OF AUTHORITIES

Cases	Page
Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975)	10
Baltimore Contractors v. Bodinger, 348 U.S. 176 (1955)	26,28
Barrett v. Roberts, 551 F. 2d 662 (5th Cir. 1977)	10
Bell v. Hood, 327 U.S 678 (1946)	40
Blackwelder Furn. Co., Etc. v. Seilig Mfg. Co., In., 550 F.2d 189 (4th Cir. 1977)	16
Carson v. American Brands, Inc., 446 F.Supp. 780 (E.D. Va. 1977)	31,33,40
Crowther v. Seaborg, 415 F. 2d 437 (10th Cir. 1969)	16
Dopp v. Franklin Nat. Bank, 461 F.2d 873 (2d Cir. 1972)	10,28
Ettelson v. Metropolitan Life Insurance Co., 317 U.S. 188 (1942)	4
Flinn v. F.M.C. Corporation, 528 F.2d 1169 (4th Cir. 1975), cert. denied, 424 U.S. 967 (1976)	28

Page

Fullilove v. Klutznick, ___ U.S.___ 65 L.Ed. 2d 902 (1980) 20

General Electric Co. v. Marvel Rare Metals Co., 287 U.S. 430 (1932) 4

Greenspahn v. Joseph Seagram's Sons, Inc., 186 F.2d 616 (2d Cir. 1951) 43

International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977) 10

Leighton v. New York S. & W.R.R., 306 F. Supp. 513 (S.D.N.Y.) (1969) 24

Messenger v. Anderson, 225 U.S. 436 (1912) 6

Morgenstern Chemical Co., Inc. v. Schering Corp., 181 F.2d 160 (3rd Cir. 1950) 4

Morse Boulger Destructor Company v. Fibre Mills, Inc., 239 F.2d 382 (3rd Cir. 1956) 43

Robbins Co. v. Laurence Mfg. Co., 482 F.2d 426 (9th Cir. 1973) 24

Rodgers v. U.S. Steel Corp., 541 F.2d 365 (3d Cir. 1976) 22

Southern Ry. Co. v. Clift, 260 U.S. 316 (1972) 6

Page

Stewart-Warner Corp. v. Westinghouse Electric Corp., 325 F. 2d 822 (2d Cir. 1963) 4,35,37

United States v. City of Alexandria, 614 F.2d 1358 (5th Cir. 1989) 28

United Steelworkers of America v. AFL-CIO-CLC v. Weber, 443 U.S. 193 (1979) 28,32,33,37,38 39,41,42

Statutes and Rules:

28 U.S.C. § 1291 ..... 28,31,41,42, 43

28 U.S.C. § 1292(a)(1) 1,2,11,21,22, 24,25,26,28, 29,30,33,34, 42,43,

28 U.S.C. § 1292(b) 22,24,25

Title VII of the Civil Rights Act of 1964, as amended, 32 U.S.C. § 2000e et seq 10,14,16, 32,35

Rule 23(e), Fed. R. Civ. Proc. 19,23

Page

Other Authorities:

Moore's Federal Practice 6

Moore and Oglebay, The Supreme Court, Stare Decisis and Law of the Case, 21 Tex L. Rev. 514 (1943) 7

Vestal, Law of the Case: Single Suit Preclusion, 1967 Utah L. Rev. 1 7

Wright, The Interlocutory Appeals Act of 1958, 23 F.R.D. 199 (1969) 25

Note, Federal Appellate Jurisdiction - A District Court Order Disapproving A Proposed Settlment of A Class Action Is Not Appealable Under 28 U.S.C. § 1292(a)(1), 48 Geo. Wash. L. Rev. 456 (1980) 24

Note, Mandamus As A Means of Federal Interlocutory Review, 38 Ohio S.L.J. 301 (1977) 24

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ARGUMENT

I

THE DISTRICT COURT'S ORDER REFUSING ENTRY OF THE PROPOSED CONSENT DECREE GRANTING PETITIONERS AN INJUNCTION IS APPEALABLE UNDER 28 U.S.C. § 1292(a)(1) AS AN INTERLOCUTORY ORDER REFUSING AN INJUNCTION

Respondents contend in their Brief that the

order of the district court below refusing to enter the parties' jointly proposed consent decree enjoining defendants to refrain from discriminating against black workers (J. A. 26), and to institute employment practices set forth in Part III of the proposed consent decree (J. A. 27a-28a), was not an interlocutory order refusing an injunction within the intendment of 28 U.S.C. § 1292(a)(1). Four basic reasons were offered by respondents in support of the contention.

First, they claim that "(h)ad petitioners made application for preliminary injunctive relief, the District Court would necessarily have undertaken de novo consideration of the grounds alleged in support" (Resp. Br. at 30). Second, they assert that "(t)he District Court's order did not impair petitioners' ability to prove facts at trial which may have entitled them to injunctive relief" (Resp. Br. at 34). Third, respondents claim that "while the District Court may have expressed an opinion concerning the lawfulness of the tendered decree, it did not pass on the legal

sufficiency of petitioners' claims for injunctive relief" (Resp. Br. at 34-35). Fourth, respondents claim that the order of the District Court can be effectively reviewed after final judgment (Resp. Br. at 28). These claims of respondents have no basis in fact or law. As petitioners will demonstrate, proof of their validity depends either upon assumptions whose truth cannot be established or upon assumptions which are demonstrably false.

A. The District Court's Order Determined The Merits Of This Action

1. The District Court Would Not Have Considered De Novo The Grounds for a Preliminary Injunction

The first three claims of respondents have a common fallacy. Underlying each claim is the fallacious assumption that identification of an order as an interlocutory order refusing an injunction is a matter which is independent of the judge's conclusions of law and the rationale upon which the order is based. Petitioners submit, however, that the conclusions of law and the rationale of the decision must be taken

into account in determining whether an order constitutes an interlocutory order refusing an injunction. It cannot be emphasized too much that the status of an order as an interlocutory order refusing an injunction is determined by the nature and the effect of the order. See e.g. General Electric Co. v. Marvel Rare Metals Co., 287 U.S. 430 (1932); Ettelson v. Metropolitan Life Insurance Co., 317 U.S. 188, 192 (1942)("The statute looks to the substantial effect of the order made"). Also, see Morgenstern Chemical Co., Inc. v. Schering Corp., 181 F.2d 160, 162 (3rd Cir. 1950); Stewart-Warner Corp. v. Westinghouse Electric Corp., 325 F. 2d 822, 829 (2d Cir. 1963)(Friendly,J., dissenting).

Apart from a consideration of the purposes of the order and the specific relief granted by it, the only reliable gauge for measuring the nature and effect of an order is to examine the rationale given in support of the order and the conclusions of law and findings of fact accompanying it. When the district court's order below is considered in

this light, it becomes evident that respondents' objections to petitioners' characterization of the district court's order as an interlocutory order refusing an injunction, are without substance and can be shown to be false.

For example, consider respondents' contention that the district court, faced with a motion by plaintiffs for a preliminary injunction, would have considered de novo the grounds favoring the motion despite the rationale of its previous ruling rejecting the proposed consent decree.

Respondents, of course, cite no authority for this proposition and petitioners have found none. The vice in the argument, apart from the fact that it strains credulity, is that it fails to take into account both the stare decisis effect of the earlier decision and the general principle that district courts are obligated to apply their earlier rulings as the law of the case.

For example, Professor Moore, in his Trea-

tise on Federal Practice, states that

> When, therefore a federal court enunciates a rule of law to be applied in the case at bar it not only establishes a predecent for subsequent cases under the doctrine of stare decisis, but, as a general proposition, it establishes the law, which other courts owing obedience to it must, and which it itself will, normally apply to the same issues in subsequent proceedings in that case.

Vol. 1B, ¶ 0.404(1), pp. 402-403. While it is true, as stated by this Court in Messenger v. Anderson, 225 U.S. 436, 444 (1912), that "the phrase, 'law of the the case' as applied to the effect of previous orders on the later action of the court rendering them in the same case merely expresses the practice of courts generally to refuse to reopen what has been decided, not, a limit to their power", still it would be a foolish litigant who, without reason to expect otherwise, proceeded upon the assumption that a court would do in the future what it has expressly stated in the past that it would not do. See also, Southern Ry. Co. v. Clift, 260 U.S 316, 319 (1972). Generally, see Moore and Oglebay,

The Supreme Court, Stare Decisis and Law of the Case, 21 Tex. L. Rev. 514 (1943); Vestal, Law of the Case: Single Suit Preclusion, 1967 Utah L. Rev. 1. What determination would have been made by the district court below if confronted with a motion by plaintiffs for summary judgment, is a matter which must be decided, in the first instance, in light of what that court has previously decided and said.

At the time when the district court made its order below, it was accepted by all sides, including the district court, that prior to September 1963, regular job classifications in the Richmond Leaf Plant such as truck driver, watchman, maintenance storage, and boiler operator, were reserved for white workers. See Carson v. American Brands, Inc., 446 F. Supp. 780, 782 (E.D. Va. 1977). It was also accepted by the district court that there were, in early 1976, 15 white watchmen and only one black watchman.[1/] Id.

1/ With respect to the other job categories, the

The district court further assumed, in denying approval of the proferred consent decree, that only 20% of the supervisory positions at the respondent American Brands' Richmond Leaf Plant were staffed with black employees as of April 1976. 446 F. Supp. at 783. Prior to September 1963, supervisory positions were restricted to white personnel. See answer #14a of Respondent American Brands' Answer to Petitioners' Second Set of Interrogatories, P. 29. The seasonal workers have traditionaly been black employees. Id. at 27-28. Also, see Carson v. American Brands, Inc., 446 F. Supp. at 782. Jobs held by seasonal employees are identical or similar to those held

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1/ (continued)

racial distribution in February 1976 was as indicated on the chart below:

Position	Whites	Blacks
Truck Drivers	5	4
Maintenance Storage	1	0
Boiler Operators	0	3

See Carson v. American Brands, Inc., 446 F. Supp. at 782.

by regular employees. See American Brands' Memorandum in Support of Entry of Proposed Consent Decree. (J.A. 38a). As stated by respondent American Brands, Inc., "seasonal employees become familiar with permanent job classifications by working in close proximity to such jobs held by regular employees." Id. The district court also assumed that in 1976, there were 37 (39.4%) regular white employees, 57 (60.6%) regular black employees, and 135 seasonal employees. 446 F. Supp. at 782. This implies, of course, that, in 1976, only 6.25% of the watchmen were black and only 20% of the supervisors were black although 60.6% of the regular employees were black.

On these assumed facts,the district court held that it did not perceive any vestiges of discrimination. 446 F. Supp at 790. Moreover, the district court's holding was adopted in the face of the parties' assurance that the proposed consent decree was intended to overcome the vestiges of racial discrimination. Id.

This holding was a mixed conclusion of law and finding of fact. It constituted, however, the law of the case. As such, it bound the district court, in the absence of special circumstances, to decide the merits of any request for a preliminary injunction in accordance with its holding that there were no vestiges of racial discrimination. Application of this holding as law of the case would, however, render it impossible for petitioners to satisfy their burden, as the movant for a preliminary injunction, to establish a substantial likelihood that they would prevail on the merits, see e.g., Dopp v. Franklin Nat. Bank, 461 F.2d 873, 878 (2d Cir. 1972); Barrett v.Roberts, 551 F.2d 662, 665 (5th Cir. 1977), or even that they could meet their initial burden of making out a prima facie case of employment discrimination under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et. seq. See International Brotherhood of Teamsters v. United States, 431 U.S. 324, 336 (1977); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975).

2. The District Court Would Not Have Reconsidered Its Order

Apparently anticipating petitioners' argument concerning this rather straightforward application of the law of the case doctrine, respondents suggest in their brief that this result can be avoided by the "District Court reconsideration of the proposed order" (Resp. Br. at 31). It is clear, however, that the appealability of an order under 28 U.S.C. § 1292(a)(1) can not possibly turn upon whether or not the losing party moves for reconsideration. This is especially the case, where, as here, there is no basis for assuming that the district court would have, in fact, reconsidered its original decision.

Besides the district court's conclusion concerning the nonexistence of any vestiges of racial discrimination, there are other aspects of the court's order which would also operate to bar the granting of a motion for preliminary injunction. For example, provisions 1, 2, 3, and 4 of Part III of the proposed consent decree make certain

benefits available to seasonal workers. (J.A. at 27a-28a). The district court objected, however, to inclusion of the provisions in the proposed decree on the ground that "the pool of employees benefiting from this provision, that is seasonal employees, has been traditionally and are now all black...(and therefore) that benefits are being bestowed on the basis of race". 446 F. Supp. at 788. The court adhered to this conclusion despite its own recognition that "legitimate nonracial business reasons may underlie such a decision".[2/] Id.

2/ Respondent American Brands, Inc., in its Memorandum in Support of Entry of Proposed Consent Decree, made the following statement about provisions 1, 2, and 3 of Part III of the proposed consent decree.

> There is sound business reasoning behind this practice. Many of the jobs held by regular employees are similar or identical to jobs held by seasonal employees. Also, seasonal employees become familiar with permanent job classifications by working in close proximity to such jobs held by regular employees. This being the case, seasonal employees provide the Company with a ready pool of experienced employees who are better qualified to fill

In light of this determination by the district court, a motion by petitioners for a preliminary injunction enjoining respondents to grant the plaintiff class of seasonal workers the aforementioned relief would have been denied since the district court would have conceived

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2/ (continued)

> vacancies in regular employment than would be outside hire. Finally, it is fair and equitable to allow qualified seasonal employees the initial opportunity to transfer to regular job vacancies. (J.A. at 38a).

Similarly, with respect to provision 4 of Part III, respondent American Brands, Inc., stated:

> Paragraph 4 is redundant of Paragraph 3 inasmuch as the job classification of Watchman is considered an hourly paid permanent production job. The practice of defendant Company is and has been however, to canvass only the most senior seasonal employees for interest in filling a permanent vacancy in the job of Watchman when no regular employee signs a posting for such vacancy. If none of the employees canvassed is interested, it has been the practice to fill the vacancy with an outside hire. This practice of canvassing only the most senior

the granting of any such relief to be equivalent to granting a remedy on racial grounds. The judgment of the district court that "preferential treatment on the basis of race ... violates the Constitution and Title VII" would thus have been decisive. Moreover, the earlier conclusion of the court that there were no vestiges of prior racial

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2/ (continued)

> seasonal employees for interest in a permanent vacancy in the job of Watchman is supported by the real need to fill such vacancies with individuals who want to be watchmen. As of March 1, 1977, the inventory of stored tobacco at defendant Company was 138, 583,770 pounds having a value of $214, 113,265. The experience has been that seasonal and regular employees have been reluctant to take this job on a permanent basis because of the night, weekend and holiday work which is required. Also, the Company wants to avoid the problem of very junior seasonsonal employees taking the job for this limited purpose of obtaining regular employment from which he or she can bid on vacancies in permanent production job classifications, thus, in effect, by-passing all the more senior seasonal employees. However, for purposes of settling this lawsuit, the defendant Company has agreed to discontinue this practice. (J.A. at 38a-39a).

discrimination would serve to reinforce the court's objections for denying a request for a preliminary injunction. In either case, it seems clear, as a practical matter, that there would not be any "de novo consideration" by the district court of either the basis for its previous ruling or of the grounds offered in support of a motion for a preliminary injunction.

3. The District Court Passed on the Sufficiency of Petitioners' Claims for Preliminary and Permanent Injunctive Relief.

These considerations also show that respondents err when they allege that "while the District Court may have expressed an opinion concerning the lawfulness of the tendered decree, it did not pass on the legal sufficiency of

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2/ (continued)

It should be noted here that there is not, in these comments of respondent American Brands, any suggestion that seasonal employees are not capable of performing the responsibilities assigned to watchmen.

petitioners' claim for injunctive relief" (Resp. Br. at 34-35). Even the most cursory, and charitable, review of the district court's order will indicate that the court's conclusions with respect to the absence of any vestiges of discrimination and the impropriety of granting judicial relief which would benefit the class of seasonal workers, are judgments which tend to show the insufficiency of a claim by petitioners for preliminary injunctive relief. Since both conclusions affect adversely the ability of petitioners to establish a prima facie claim, they tend to prove the insufficiency of both a claim for preliminary injunctive relief as well as petitioners' overall Title VII's claims. See Crowther v. Seaborg, 415 F.2d 437 (10th Cir. 1969); Blackwelder Furn. Co, Etc. v. Seilig Mfg. Co., Inc., 550 F.2d 189, 197 (4th Cir. 1977).

Respondents are much too ingenuous in their argument. They seek to draw a distinction between the expression of an "opinion concerning the lawfulness" of the parties' requested claim for

injunctive relief, as embodied in the proposed consent decree, and the "pass(ing) on the legal sufficiency of petitioners' claim for injunctive relief". Whatever the differences are which might generally be drawn between the two actions, it is plain here that those differences will be nil when, as here, the court's opinion is so expansive that it analyzes and decides what would also be the merits of a claim for injunctive relief.[3/]

Respondent's confusion on this point can

3/ This analysis also shows, contrary to respondents' assertion, that the order of the district court did "impair petitioners' ability to prove facts at trial which may have entitled them to injunctive relief". (Resp. Br. at 34). It cannot be gainsaid that the district court's belief that judicial relief on behalf of seasonal workers is tantamount to unlawful discrimination on the basis of race, has an adverse impact upon petitioners' efforts to obtain judicial relief for the class of seasonal employees. Indeed, respondents' actions, following the announcement of the district court's opinion, seemed to constitute a recognition of the various hazards which petitioners would face in seeking to establish their claims in the district court. Indeed that recognition may well have been a causative factor inducing them to object to the appeal of this action to the Fourth Circuit. See J.A. at 4-6. Similarly the district court's finding that there were no vestiges of prior

be traced to their failure to appreciate that what, in part, made the district court's order an interlocutory order passing on the sufficiency of petitioners' injunctive claim was the refusal by the district court, as indicated by the opinion, to limit its decision to factors which concerned the propriety, or impropriety, of approving the proposed consent decree. Rather the court used its opinion to address issues affecting ultimate resolution of the merits of the action.

For instance, the district court's decision on whether relief could be granted to seasonal employees or on whether the pre-1963 segregation of jobs by race constituted evidence of the existence of vestiges of prior racial discrimination (when considered in conjunction with a work force in which blacks comprised 20% of the production supervisors and 6.25% of watchmen while

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3/ (continued)

racial discrimination, would also hamper petitioners' ability to prevail at trial.

constituting the vast majority of new hires since 1971, 446 F. Supp. at 783 (J.A. at 36a-37a, 47a)), has a bearing on the merits of the lawsuit. It was the district court's excursion into these and other areas which transformed the opinion and order of the court into something more than a decision under Rule 23(e), Fed. R. Civ. Proc., and projected it instead into a determination on matters affecting the merits of petitioners' claims for preliminary and final injunctive relief.

3. The District Court's Order Could Not Be Reviewed Prior to Final Judgment

Respondents also contend that "the parties could have presented the same or alternative proposals at any stage in the proceedings".[4/]

4/ This contention fails to recognize the far-reaching nature of the district court's conclusions. The decision was of such wide scope that it eliminated a broad range of settlement proposals. For example, it eliminated the possibility that a remedial, race-conscious, affirmative action program could be embedded into a consent decree. See Carson v. American Brands, Inc., 446 F. Supp. at 789-790.

(Resp. Br. at 29). This point was offered in support of their more general thesis that the district court's order rejecting the proposed settlement was one which could be reviewed subsequent to final judgment. (Resp. Br. at 28-30).

4/ (continued)

Similarly, the order precluded the possibility that the consent decree could be fashioned to improve the position of seasonal workers as a class. Clearly, the district court would have assumed that any relief of this kind would constitute, given the racial composition of the class of seasonal workers, an unlawful racial preference. 446 F. Supp. at 788-789.

The elimination of any form of remedial relief for seasonal workers of this description or remedial relief to black workers went, of course, to the heart of any possible settlement of the action.

Moreover, the district court's insistence that the relief must not cause what it termed harm to "innocent third parties" also reduced the allowable scope of acceptable compromises. 446 F. Supp. at 786, 790. Also, the district court's concern with the impact of the settlement decree upon "innocent parties" is far different than the way in which this Court has considered the problem. Only recently, this Court said, in Fullilove v. Klutznick, ___ U.S. ___, 65 L.Ed.2d 902, 928 (1980), that

Quite obviously, it would be meaningless to present to the district court for approval the same proposals which it so emphatically rejected. Moreover, nothing in the history and meaning of 28 U.S.C. § 1292(a)(1) requires adoption of such a meaningless gesture. Petitioners and respondents were entitled to assume that the opinion of the district judge stated his actual assessment of the legal issues and further to assume that the assessment, would constitute the law of the case. Thus, it was quite unrealistic to assume that the court's order was not final, and that it would be reviewed again by the district judge.

As a further argument in support of their contention that the district court's order could be "reviewed both prior to and after final

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4/ (continued)

> Moreover, although we may assume that the complaining parties are innocent of any discriminatory conduct, it was within congressional power to act on the assumption that in the past some non-minority businesses may have reaped competitive benefit over the years from the virtual exclusion of minority firms from these contracting opportunities.

judgment" (Resp. Br. at 28), respondents claim that "there remained other means of obtaining injunctive relief short of trial and post-judgment review". (Resp. Br. at 30). Two of the other means were identified by respondents. They were (1) "a request for certification under 28 U.S.C. § 1292(b)" and "a writ of mandamus". (Resp. Br. at 30). Petitioners, however, submit that the construction and application of 28 U.S.C. § 1292 (a)(1) are not, in general, to be determined by the availability of review pursuant to a writ of mandamus. On the other hand, review by certification under 28 U.S.C. § 1292(b) is dependent upon the unavailability of review under § 1292(a)(1).

Respondents cite the decision of the Third Circuit in Rodgers v. U.S. Steel Corp., 541 F.2d 365 (3d Cir. 1976) for the proposition that the district court's order could be reviewed by writ of mandamus. This decision, however, supports petitioners' argument, not that of respondents. In its opinion, the Third Circuit states conditions under which review by mandamus is pos-

sible. It says that:

> (R)eview by mandamus may be available in those rare instances where a district court has acted outside the scope of its jurisdiction or arbitrarily and in disregard of appropriate procedural safeguards...

541 F.3d at 372.

This standard is not satisfied in the instant action. Petitioners do not claim that the district court's actions are outside its jurisdiction. Nor do petitioners claim that the district court's order violated procedural safeguards. Petitioners have, at all times, limited their claim to the allegation that the district court failed to apply applicable principles of law in determining whether the parties' proposed joint settlement decree should be approved pursuant to Rule 23(e) of the Fed. R. Civ. Proc. A district court's failure to apply correct legal principles to a case before it does not make the resulting orders reviewable thereby pursuant to a writ of mandamus.

Similarly, review by certification pursuant

to § 1292(b) is unavailable. This route of review has, more over, been severely restricted by the cases. For example, it has been stated that review by certification should be granted only in extraordinary cases where necessary to avoid protracted and expensive litigation, Robbins Co. v. Laurence Mfg. Co., 482 F.2d 426, 429 (9th Cir. 1973), or where there exists unusual circumstances warranting such review. Leighton v. New York S. & W. R. R., 306 F. Supp. 513, 515 (S.D.N.Y. 1969). See generally, Note, Federal Appellate Jurisdiction - A District Court Order Disapproving A Proposed Settlement of a Class Action Is Not Appealable Under 28 U.S.C.§ 1292(a)(1), 48 Geo. Wash. L. Rev. 456 (1980). See generally, Note, Mandamus As A Means of Federal Interlocutory Review, 38 Ohio S.L.J. 301 (1977). No unusual circumstances exist here. Nor is this an extraordinary case or one where the litigation is especially protracted or expensive. Finally, it has been stated that § 1292(a)(1) and 1292(b) are mutually exclusive. See Wright, The Inter-

locutory Appeals Act of 1958, 23 F.R.D. 199, 202 (1969). Indeed, § 1292(b) states explicitly that it is applicable only when an order is "not otherwise appealable under this section".

C. The District Court's Order Will Cause Petitioners Irreparable Injury Unless An Immediate Appeal Is Allowed.

Respondent's argument against allowance of an appeal under § 1292(a)(1) of the district court's order below, is also based upon a claim that irreparable injury will not result to petitioners if the appeal is disallowed. The merits of this argument can perhaps best be considered by examining the relationship between orders encompassed by § 1292(a)(1) and the requirement of irreparable injury. If an order has been shown to be within the scope of § 1292(a)(1), then it is not necessary to make a further showing of the existence of an irreparable injury. The irreparable injury is, in this instance, simply assumed as a result of the order's inclusion within

§ 1292(a)(1).[5/]

In short, there is no need to make a judicial assessment of the existence of an irreparable injury if the order falls within the scope of § 1292(a)(1). Such an assessment is only required where a doubt exists concerning the applicability of § 1292(a)(1) to a particular order or class of orders. When such an eventuality occurs, consideration must then be given to whether orders of that category are generally likely to cause irreparable injury in the absence of an immediate appeal.

Now, the order under consideration in the present action is an interlocutory order refusing to approve a proposed consent decree enjoining respondents from further violations of Title VII's

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5/ For example, interlocutory orders denying a request for a preliminary injunction are within the intendment of § 1292(a)(1). Baltimore Contractors v. Bodinger, 348 U.S. 176, 182 (1955). When an order denying a preliminary injunction is issued by a district court, it is therefore not necessary to make an independent judicial assessment of whether the order causes an irreparable injury in the particular case.

ban against employment discrimination based upon race. The district court's order, however, has the effect of permitting respondents to continue with their alleged discriminatory practices until final judgment is rendered. The order is indifferent to the impact which the alleged discriminatory practices have upon petitioners since the district court does not believe that there are any vestiges of racial discrimination at the Richmond Leaf Plant.

The effects of the order, however, are severe. For example, as a consequence of the order, seasonal workers are denied, until the completion of trial, the experience, knowledge, training, longevity, skills, and recognition which they would have acquired, through approval and enforcement of the proposed consent decree, as regular employees, watchmen, boiler operators, track drivers, production supervisors, etc. Since the extent of the delay of the trial cannot be calculated, there is no way to specify precisely the scope and magnitude of this injury. The

harm meanwhile caused to the plaintiff class of seasonal workers, however, will be irreparable.[6/] The resulting loss of experience, skills, knowledge, and job tenure, will place these workers at a competitive disadvantage with respect to other workers inside, and outside, the Richmond Leaf Plant.[7/]

6/ In the context of an appeal taken pursuant to 28 U.S.C.§ 1291 by means of the collateral order exception, the irreparable injury, besides including the loss of competitive advantage and the loss of rights sanctioned by United Steelworkers of America v. AFL-CIO-CLC v. Weber, 443 U.S. 193 (1979), would also include the loss of the right to settle the lawsuit without trial as well as the incurring of additional expense and loss of time.

7/ In this context, it should be remembered that § 1292(a)(1) was designed to "permit litigants to effectively challenge interlocutory orders of serious, perhaps irreparable consequence." Baltimore Contractors, Inc., v. Bodinger, 348 U.S. 176, 181, (1955).

Neither in an appeal of an order denying a preliminary injunction nor in an appeal of the district court's order below is there a necessity to make a final determination of the merits. In both cases a preliminary assessment of the merits will suffice. Compare, for example, Dopp v.

This injury is precisely the type of injury which a preliminary injunction is designed to thwart. The same considerations which presume the existence of irreparable injury when a preliminary injunction is denied argue here for the application of § 1292(a)(1). See e.g., United States v. City of Alexandria, 614 F.2d 1358 (5th Cir. 1980).

The district court's denial of the motion for approval of the proposed consent decree also caused irreparable injury by denying the parties their only meaningful chance of settlement. It damaged thereby the public and private interest in the use of voluntary settlements. The court's judgment operated, through the use of erroneous legal principles,to diminish substantially the amount of maneuvering room needed for agreement on mutually acceptable compromises. Moreover, it threatens to unduly affect the petitioners' pre-

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7/ (continued)

Franklin National Bank, 461 F.2d 783 (2d Cir. 1972) with Flinn v. F.M.C. Corporation, 528 F.2d 1169 (4th Cir. 1975), cert. denied, 424 U.S. 967 (1976).

paration for trial and chances for recovery. Injury of this quality and magnitude is certainly irreparable to the petitioners.

Finally, the order caused irreparable injury to the public interest since disallowance of an immediate appeal will grant district courts an essentially unreviewable power to coerce parties into fashioning proposed settlements decrees which reflect the district court's erroneous conceptions of applicable legal principles. This could easily lead to widespread enforcement by the district courts of settlement decrees totally at variance with constitutional and other federal values. Respondents' arguments would support such a result and therefore should be rejected. For the reasons stated herein, the judgment below should be reversed and petitioners should be granted their right to appeal the district court's order pursuant to 28 U.S.C. § 1292(a)(1).

II

THE DISTRICT COURT'S ORDER IS A COLLATERAL ORDER WHICH IS APPEALABLE AS AN EXCEPTION TO 28 U.S.C. § 1291

Respondents contest petitioners' characterization of the district court's order as a collateral order appealable as an exception to 28 U.S.C. § 1291 under the rule announced in Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949). It is respondents' position that the order did not conclusively determine any collateral interests, that it did not resolve any issues which were completely separate from the merits, and that it was effectively reviewable upon the rendering of final judgment herein.

A. The District Court's Order Conclusively Determined Important Interests of the Parties Concerning Settlement and the Use of A Remedial, Race-Conscious Affirmative Action Plan.

With respect to § 1291, the nature and effect of the district court's decree was to determine three issues of critical importance to the parties. First, the decree, as previously mentioned, prejudged certain issues on the merits, such as

whether there were vestiges of prior racial discrimination or whether race-conscious remedial programs violated the Constitution and Title VII of the Civil Rights Act of 1964, as amended, or whether judicial relief awarded to seasonal workers as a class would per se constitute discrimination against white employees. Second, the district court's decree deprived the parties of the opportunity to settle the litigation and thereby avoid an unnecessary waste of money, time, and resources.

Third, the district court's order deprived the parties of the right which this Court recently affirmed, in United Steelworkers of America, AFL-CIO-CLC v. Weber, supra, to exist for unions, employees, and employees with respect to industries in which there has existed a traditional pattern of segregation and discrimination against minorities, namely, a right to adopt and implement voluntarily a remedial, race-conscious affirmative action plan designed to "break down old patterns of racial segregation and hierarchy", to "open

employment opportunities for Negroes in occupations which have been traditionally closed to them", and "to eliminate a manifest racial balance" " and not "to maintain racial balance." United Steelworkers of America,AFL-CIO-CLC v. Weber, supra, 443 U.S. at 208.

The first mentioned effect concerns the merits of the action and thus is particularly applicable to appeals under § 1292(a)(1). The last two effects, however, involve collateral issues that are separate and apart from the merits. They are relevant to the issue of appealability under the collateral order exception articulated in Cohen v. Beneficial Indus. Loan Corp., supra. 9/

9/ Respondents' failure to recognize the three distinct effects of the district court's order is apparently responsible for their inability to understand how the order below can simultaneously be appealable both as a collateral order and as an interlocutory order denying injunctive relief. They seem to assume that reconciliation of these two positions is "schizophrenic" since in their mind "a single court order cannot simultaneously be 'collateral to' the claim, as required by the collateral order doctrine, while at the same time

It is these last two effects of the district court's order which respondents claim were not conclusive determinations.

It is, of course, true, as respondents contend, that the district court's order did not

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9/ (continued)

'affecting the merits' of petitioners' claims and passing on the legal sufficiency of any claims for injunctive relief', as required for appealability under § 1292(a)(1)." (Resp. Br. at 32, n. 18).

But surely, there can be no difficulty in comprehending how a single court order, composed of several different components, can have several distinct effects. Nor is it incomprehensible that each of these distinct effects, or components, might affect different things differently or that one effect might concern the merits of a claim while another effect might be totally extraneous to the merits. Such possibilities exist whenever there is a single order which decides distinct issues.

The critical question is not whether there is a single order but rather "What did the single order decide and for what were the issues decided relevant?" These questions are not answered, as respondents suggest, by looking to see if the order is in some sense unitary, but rather they

operate to preclude every imaginable type of settlement but surely such an extreme result is not required by the Cohen rule. The finality achieved by the district court's order with respect to the parties' interests in settlement of the litigation was primarily caused by the court's invocation of an erroneous set of legal principles to close off areas of settlement opportunities. As Judge Friendly noted in his dissenting opinion in Stewart-Warner Corp. v. Westinghouse Electric Corp., 325 F. 2d 822,829 (2d Cir. 1963):

> The danger of serious harm from the court's erroneous belief in the existence of a legal barrier to its entertaining a claim for an injunction has been thought to outweigh the general undesirability of interlocutory appeals.

Settlement opportunities were foreclosed by the district court's order in several ways. First, the court held, as a matter of law, that "(p)referential treatment on the basis of race... violates the Constitution and Title VII". 446

7/ (continued)

are answered by looking at the nature of the relief provided by the order and the nature of the conlusions of law and findings of facts, if any, upon which the order was based.

F. Supp. at 788. Second, the court found, as a mixed issue of law and fact, that, despite the history of discrimination, there were no vestiges of racial discrimination at the Richmond Leaf Plant. Id. at 790.

Third, the court concluded that relief on behalf of the plaintiff class of seasonal employees could only be given if members of the class were shown to have been prior victims of racial discrimination at the Plant. 446 F. Supp. at 786. And fourth, the court found that settlement agreements which either failed to include findings of prior racial discrimination or which included general exculpatory clauses concerning discrimanatory practices, cannot serve as the basis for a consent decree. 446 F. Supp. at 788-789.

Each of the above holding was made as a matter of law. Judicial holdings as to what the law is necessarily must be taken as conclusive determinations. The existence of avenues for obtaining reconsideration is irrelevant to this issue. Indeed, it was the finality of a court's legal conclusions, compared to its discretionary

findings that made Judge Friendly in Stewart-Warner Corp. v. Westinghouse Electric Corp., supra, emphasize how important it was to recognize the

> "distinction...between a 'refusal' based on an allegedly erroneous conclusion that the law does not permit the claim for an injunction to be heard in the action...and one based on alleged abuse of a discretionary power over the scope of the action", 325 F.2d at 829.

Moreover, as he pointed out "The very fact that... (an) order hinges on the trial court's discretion is itself an indication that such orders...carry a lesser threat of harm". Id. Applying Judge Friendly's analysis to the facts here, it is plain that the holding of the district court below is not based upon the exercise of discretionary power but rather is based upon the court's ascertainment of what it perceives to be the governing principles of law.

The district court's order was clearly a conclusive determination of the parties' right to do, whether in or out of court, what this Court sanctioned in United Steelworkers of America,

AFL-CIO-CLC v. Weber, supra, i.e., the right to institute a race-conscious, remedial affirmative action program. The district court's determination of the issue is separate from its refusal to enter a judicial decree incorporating the settlement terms arrived at by the parties. In light of the district court's opinion, there can be no question but that an out-of-court agreement between the parties, which incorporated the terms of the proposed consent decree, would be vulnerable, unlike the one upheld in United Steelworkers of America, AFL-CIO-CLC v. Weber, supra, to a successful judicial challenge in the district court at the hands of dissatisfied white regular employees. This consequence of the order demonstrates the extent to which it not only constituted a final determination of certain collateral issues but also shows the extent to which the order undercuts the rights of workers and employers to use agreements produced out of court to remedy racial imbalance in historically segregated industries by the establishment of

corrective, voluntary, race-conscious affirmative action programs. See e.g., United Steelworkers of America, AFL-CIO-CLC v. Weber, supra.

B. The Order of the District Court Resolved Important Issues Completely Separate From the Merits of the Action

In lieu of what has been said in the previous section concerning the finality of the district court's order with respect to its determination of purely legal issues, it follows that the collateral issues determined by the order are separate and apart from the merits of the lawsuit. As indicated previously, these collateral issues concern (1) the parties' interests in settling their lawsuit without tailoring the settlement to reflect erroneous conceptions by the district court of the relevant legal principles and (2) their right to adopt, whether in or out of court, an affirmative action program conforming to guidelines set forth by this Court in United Steelworkers of America, AFL-CIO-CLC v. Weber, supra.

Respondents object to identification of these interests as collateral matters within the scope of the Cohen rule. First, they claim that the "'right' to settle pursuant to the tendered decree...is an issue encompassed within the 'abuse of discretion' questions expressly excluded from the grant of certiorari in this case" (Resp. Br. at 13). This objection misses the point. Petitioners are not asking the Court to confirm, or decide, that such rights, or interests, exist but rather they assert only that the allegation of the existence of such interests, or rights, is sufficiently substantial to permit invocation of the collateral order doctrine. See e.g., Bell v. Hood, 327 U.S. 678 (1946). Where-as here-appealability is based upon the collateral order exception, a decision upholding appealability does not necessarily imply that the Court recognizes the existence of the alleged collateral rights, or interests. A decision favoring appealability means only that the Court agrees that the alleged collateral interests are sufficiently substantial

to warrant inquiry for the purpose of determining whether the claim, if made out, would constitute a cause completely separate and apart from the merits of the action to invoke the exception to § 1291 permitted under Cohen v. Beneficial Loan Corp., supra.

Respondents also allege that this Court's decision in Weber, supra, failed to establish the existence of a right to settle a lawsuit (Resp. Br. 13-15). While technically, this is correct, it nonetheless remains true that the Court's decision in that case actually precluded a collateral attack, by a third party, on the validity of an out-of-court agreement. Thus the Court's action indirectly constituted judicial support and sanction for the out-of-court agreement. The decision in Weber, therefore, recognized the right of unions, employers, and employees to fashion, out-of-court, remedial, voluntary, private affirmative action agreements which can be protected against undue judicial interference. In essence, Weber recognized the

legitimacy of the interests of private parties in entering into private, race-conscious, voluntary affirmative action programs.

This interest is, of course, distinct from the interests which parties have in settling an on-going lawsuit. Although the decision in Weber may not be directly applicable to this latter issue, it is relevant to it. To the extent that a settlement of a pending case parallels that of the agreement in Weber, supra, the validity of the settlement is governed by the principles set forth in Weber, supra.

Petitioners, in their previous Brief, demonstrated that the collateral issues discussed here are separate from the merits of this action. That discussion need not be repeated here. In this Reply Brief, petitioners have also demonstrated that the district court's order caused them to suffer irreparable injury. That argument, which was made with respect to § 1292(a)(1) is equally applicable to § 1291, and for that reason also need not be repeated.

Similarly, the arguments concerning reviewability of the district court's order, were also made in petitioners' Brief and are not repeated here. Moreover, the arguments, which were made in the instant brief, under § 1292(a)(1), on the issue of reviewability, are readily translatable to § 1291. These arguments, considered separately and collectively, require that judgment below be dissmissed and that petitioners be allowed to appeal the district court's judgment as an exception to the requirements of § 1291 in accordance with the Cohen rule.[10/]

10/ The respondent unions' argument that the action is moot because they have withdrawn their consent to the proposed decree is frivolous. See Morse Boulger Destructor Company v. Camden Fibre Mills, Inc., 239 F. 2d 382, 383 (3rd Cir. 1956); Greenspahn v. Joseph Seagram ' Sons, Inc., 186 F. 2d 616, 619-621 (2nd Cir. 1951). No action has been taken by the district court on the respondent unions' motion to withdraw their consent to the proposed decree. Accordingly, this Court, being vested with jurisdiction of the case, has the power to define the circumstances under which respondent unions' consent to the proposed consent decree can be withdrawn.

CONCLUSION

For the reasons indicated herein the decision below should be vacated with instructions to allow the appeal.

Respectfully submitted,

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